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Supreme Court, U.S.
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No 95-30

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

Richard L. Fishell and

Dorothy M. Fishell

Petitioners

vs

Robert Soltow and

Rosalee Soltow and

John A. Porter, Trustee

Respondents

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY TO

TO BRIEFS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the bankruptcy court, in considering a contested Rule 9019 motion brought by a Chapter 7 Trustee, complies with the requirements set forth in Protective Committee for Stockholders of TMT Trailer Ferry v Anderson, 390 US 414 (1968) by approving the compromise of an adversary proceeding and a claims objections proceeding when the terms of that compromise produce a $2,000 payment to the estate in return for the estate's relinquishment of an opportunity to recover property valued at $1.38 million and where the court

a. neither requires nor receives testimonial or other evidentiary submissions of any kind;

b. neither allows, disallows or otherwise values the "Proof of claim" being resolved by the compromise;

c. neither discusses nor analyzes

the facts, the merits or the legal issues raised by that "Proof of Claim";

d. neither discusses nor analyzes the facts, the merits or the legal issues raised by the various counts of the complaint in the adversary proceeding being resolved by the compromise; and

e. renders approval of the compromise without setting forth any findings of fact or conclusions of law related to the merits of the "claim" or the causes of action stated in that adversary complaint.

2. Whether the panel decision results in the creation of a conflict between the law of the 6th Circuit and the law of the 7th and 9th Circuits, as well as that set forth by the United States Supreme Court.

3. Whether the panel decision in this case announces a departure from prior precedent concerning evidentiary standards

or burdens placed upon compromise proponents in compromise proceedings in bankruptcy court under Rule 9019 of the Bankruptcy Rules.

4. Whether the panel decision in this case announces a departure from prior precedent concerning the adequacy of the compromise hearing record which must be made before the bankruptcy court so that an appellate court may determine whether the bankruptcy court has rendered "an informed and independent judgment" on the propriety of a compromise which that court approves.

5. Whether the panel decision properly determined that the Debtors lacked standing to appeal an order of the bankruptcy court, rendered pursuant to Rule 9019, entered over the Debtors' objection, where no 6th Circuit authority is cited in support of the panel decision and the panel decision conflicts with the decision of the 1st Circuit, cited

by the panel as authority, and conflicts with 7th circuit authority more directly and factually relevant.

6. Whether Debtors in cases, such as this one, which are not "no-asset" cases may be denied standing to appeal an order, rendered pursuant to Rule 9019, entered over their objection where such order, both, forecloses the Debtors from possible recovery of property through an adversary proceeding and concurrently forecloses consideration of the Debtors objection, filed pursuant to Rule 3007, to a Proof of Claim filed against their bankruptcy estate.

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Argument - Rule 9019

The Respondents themselves have provided further support for the granting of the writ in this case as each brief sheds further light on the deficiencies in the lower court settlement record.

As prescribed by TMT, "clear support in the record coupled with sound analysis" must appear. [1] This is the threshhold which the settlement proponents and the court were required to cross. "Boiler plate" approval does not comply with TMT. [2] Unless the reviewing court can 1) identify pertinent settlement factors from the record and 2) also examine the bankruptcy court's assessment or analysis regarding

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1. See Matter of Jackson Brewing Company, 624 F 2d 605, 608 (5th Cir 1980)(citing TMT).

2. 390 US at 434. The bankruptcy court must provide the reviewing court

> "....some basis for distinguishing between well reasoned conclusions... and mere boiler plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law."

those factors, review of the bankruptcy court's decision to approve the settlement is impossible. Without such a foundation the reviewing court is left, not with the facts and law which moved the bankruptcy court to act, but with its ultimate conclusions only. Ultimate conclusions, alone, are not sufficient.

The court of appeals opinion reflects these deficiencies. At (A18) the opinion supplies "estimates" about unspecified delay and unquantified litigation expenses which are so broad as to be better described as speculation. The court of appeals was unable to perform its review because the settlement proponents and the court did not furnish the facts or the analysis necessary for that review. The court of appeals could do no more than canvass the range of possible sources of information available to the bankruptcy court, see (A 14-15), rather than focus on the par-

ticulars which would have shown, or failed to show, the legitimacy or the propriety of the overall approval.

The briefs of the Respondents provide further illustrations of the inadequacy, of the approval method. First, there are examples of assertions of "fact" for which there is no citation either to the Appendix or to any other place in the bankruptcy proceedings.[3] Second, in an effort to show

3. In the Trustee's Br. p.1-5, there are references to, e.g. an alleged hardship to Soltow and also to an alleged inability of Fishells to sell the property. The citations given do not support such assertions. The citations are not to "fact" but to speculation engaged in by the court or by the Trustee.

Soltow's Br. p. 1-7, 9-12, 14-23, supplies a far more offensive example of this. In the 24 page Brief only 10 citations are to the Appendix, yet the Appendix contains the complete record of the settlement proceedings. Soltow's Brief is nothing other than a overzealous advocate's unrestrained version of a case which was never tried and covers matters never established by any evidence. It is more akin to an opening argument. It does not inform the reader as to where, in the lower court record, proof of Soltow's version of the case would be found.

the absence of circuit conflict, the Trustee notes that the circuit authorities cite the general Rule 9019 compromise principals which apply, as if merely quoting the principal were the equivalent of a proper application of that principal.

Aside from the highly objectionable practice of setting out factual contentions which have no basis in the record, such practice reveals the inadequacy of the bankruptcy court's consideration of the merits of the controversies it was being asked to settle.[4] Factual assertions of the nature set forth in these briefs for which no record source is noted, might represent the kinds or "categories" of factors which should have been examined by the bankruptcy court.

4. Where the Respondents thought certain of their factual assertions significant enough to include here, those "facts", if true, should be found in the record of the settlement considerations. The fact that they do not displays the handicap imposed on the reviewing courts.

The settlement transcript (A 105) provides no evidence of this. Such evidence as that court considered should have appeared in the bankruptcy court proceedings together with an analysis of its' merits.[5] The moving papers, the presentations of the proponents and the bankruptcy court's ruling are all couched in the most general of terms, all of which skirt the substance of the adversary complaint, as well as the

5. The absence of such a record in the settlement proceedings is further evidence that the bankruptcy court did not fulfill its own "independent" duty to apprise itself fully of the adversary complaint or the Proof of Claim. This is particularly true with respect to the Soltow slander of title Proof of Claim. See (A 42) and (A 105) for what little note is taken of this issue by the court. At the very least, the bankruptcy court left no evidence that it had done so for a reviewing court to examine. The adequacy of TMT compliance is measured by the lower court's actual analysis, not by the magnitude of the court file which may have been available for study. However, this latter standard seems to have sufficed for the court of appeals here. See (A14-15, 18). See Matter of AWECO, 725 F 2d 293, 299 (5th Cir 1984), "the bankruptcy judge should not reach for his stamp marked 'approved' unless some party supplies concrete facts".

Proof of Claim.[6] The missing material is not to be found. (A 42) (A 105)

The second feature which reveals the failure of the lower appellate courts to comply with their duties under TMT is revealed most clearly in the Brief of the Trustee. The Trustee contends that no circuit conflict exists on the compromise standards. In support of this he notes that various circuit opinions have quoted the language of the general rules which are to be applied to Rule 9019 compromises and concludes from this that the quoted

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6. The record should not, at this stage, remain so "un-settled" that Respondents could still argue, speculatively or inaccurately, e.g. that the Soltow loan was for the purchase of the property (Br. p 4) or that the value of the property or the appraisal of $1.38 million from 1989 was subject to debate (Br. p 11-12, 21) or that the concept of a "lien" and a "lis pendens", as well as their legal effect, remained confused or that those concepts were somehow interchangeable, (Br p. 12, 19-20), or that any factor supported any part of the Soltow slander of title theory upon which the Proof of Claim was based (Br p. 11-12, 19-20).

standard has been followed and properly applied by the citing court. However, quoting the proper standard is a far different matter than applying that standard to the issue at hand and therein lies the deficiency in the present case. "General rules" only derive meaning through proper application. Those settlement principals can not be applied in a vacuum. The sixth circuit opinion notes the proper "rule" but finds itself without the "facts" or lower court "analysis" upon which the apply the rule. Without sufficient material in the moving papers, or in the evidence presented in support of the settlement a reviewing court is left with no opportunity to do anything other than speculate about what the bankruptcy judge considered. This is what occurred here. Thus, it is not possible to determine whether the rule of TMT was complied with, and the entire purpose of the rule is defeated.

TMT requires an identifiable basis in the settlement proceedings, not merely the suspicion that such a basis may exist. The Sixth Circuit, however, permitted the latter of these alternatives and, in so doing, has strayed from the requirements of TMT. See (A 14-15, 18)

The sixth circuit rule arising from this case effectively authorizes approval of settlements where assumption is left to rest upon assumption. It was as if the Sixth circuit concluded that with a broad opportunity for examination which a possibly extensive court file would provide, a reviewing court could assume that the bankruptcy court considered all that was relevant therein, and having so assumed, the reviewing court then further assumed that the bankruptcy court adequately or reasonably balanced and resolved all of the issues therein arising.

Such abdication of duty by a reviewing

court renders the TMT rule to be meaningless. With the Circuit Court ruling in this case, TMT has met its demise in the Sixth Circuit. Unless this is corrected, it is possible that other circuits would be pursuaded to adopt its relaxed methodology, and that bankruptcy courts, whose proceedings are already, in many respects, summary in nature, will be encouraged to act even more summarily on issues of this type, to the detriment of all but the most influential or persistent creditor.

The Respondents can not show from the settlement record how the standards set by TMT, or those followed by any circuit cited, were met in this case.[7]

7. Proponents of settlement carried the burden of proof, In Re Hydronic Enterprises Inc., 58 BR 363 (Bankr D RI 1986); In Re A & C Properties, 784 F 2d 1377 (9th Cir 1986), while the bankruptcy court had an independent duty to apprise itself. In Re American Reserve Corporation, 841 F 2d 159 (7th Cir 1987). The record of the proceedings shows that neither achieved what was required.

Argument - Standing

On the issue of standing, Andreuccetti is clearly the relevant authority from the petitioners' standpoint. The bankruptcy court did not conclude that the Petitioners (Debtors) lacked standing to oppose the settlement and did not determine that the Debtors would lack standing to appeal (A 42 and A 105). The District Court concluded that the Petitioners lacked standing to appeal because that court overlooked the contents of the record before it which included any necessary asset and liability information. See (A 241-242)

The Trustee rejects, without analysis, many of the other authorities cited contending that they are irrelevant, as applying to "creditors" only. At issue in each of them, however, is distribution under 11 USC 726(a). So it is with the Debtors as well. See 11 USC 726(a)(6). The Debtors, like any other possible distributees of

the estate, have rights under 11 USC 726(a). The Debtors are in the same class as other creditors, despite their having the lowest priority amongst the members of the class entitled to distribution, or possible distribution, from the estate. If any subclass of creditor has standing to appeal a decision affecting his right to distribution, certainly the Debtors should also be accorded that right. Though they are the last to receive distribution from the estate, they are, because of that order of priority, the first to be affected by any settlement made which affects the assets of the estate from which they would receive distribution. The authorities noted by Petitioners are not irrelevant. Debtors should be accorded standing because 1) the settlement affected their pecuniary interest adversely,[8] 2) they are legitimate

8. Matter of Andreuccetti, 975 F 2d 413, 417 (7th Cir 1992)(possible surplus is sufficient to accord standing to appeal).

claimants to the fund comprising the chapter 7 estate[9] and 3) they filed a valid and timely objection to a claim against that estate, which claim was compromised by the settlement complained of here. (A 85) Claims objection proceedings are "contested matters" under Rule 9014 and a participant in such a proceeding is an "aggrieved party" with standing to appeal.[10] For each and any of these reasons, the Petitioners possessed standing to appeal.

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9. 11 USC 726(a)(6).

10. Rule 3007; Mulligan v Sobiech 131 BR 917 (DC SD NY 1991)(debtor is deemed to be party in interest and Section 502 provides that an objection may be made by any party in interest); 8 L. King, Collier on Bankruptcy, Sec 3007.03(2)(15th Ed. 1990); In Re Chateaugay Corporation, 64 BR 990(DC SD NY 1986)(participant in a contested matter is an aggrieved party with standing to appeal).

Argument - Opposing Briefs

The briefs of the Respondents contain material, or assertions, that were never part of the evidence in the bankruptcy court, neither as a part of the settlement proceedings nor otherwise. This practice, also present in proceedings in the lower courts, has led, (or required), the lower courts to engage in speculation, not only about the propriety of the terms of the settlement involved, but about the settlement procedure itself, as though the record, as "enhanced, magnified or distorted" by the briefs might justify the settlement and the procedure employed, after all.

The only issue is, however, whether or not the bankruptcy court sufficiently performed its task under the guidelines provided by TMT. A major purpose of those standards is to assure that some means of review is made available. A bankruptcy court record of the settlement proceedings

which is so slight as to lend itself to this "after the fact" enhancement can not be said to have conformed to any meaningful standard or guideline at all.

Rule 9019 requires court approval of settlements because those settlements affect far more interests than merely those of the litigants directly involved in the matter being settled. The settlement at issue here is deficient both in terms of what the proponents put into justifying it and in terms of what the court undertook in approving it. A proponent of that settlement, desiring to see it sustained by a reviewing court and finding himself unbounded or uninhibited by the obstacle of a concise and well defined settlement record might find it all too tempting to "supplement" that which was actually before, and considered by, the lower court. So it is here.

Forty minutes of speculation by compro-

mise proponents wherein no particulars of the merits of the matters to be settled are argued, no evidence is presented and no findings of fact are made, (A 109) all but guarantees overstatement and misstatement in briefs and little more than large scale guessing by any appellate court called upon to review the matter.

If the "relaxed" review standard arising from this case, as now approved by the Sixth Circuit, is not disapproved by this Court then no effective means of review will remain for any future settlement under the bankruptcy rules. A direct conflict with TMT, and the several circuits, is now obvious.

Conclusion

If the bankruptcy court decisions under Rule 9019 are to be made, in all practical effect, unreviewable, then such a rule must emanate from this Court. Permitting the Sixth Circuit decision in this case to stand creates uncertainty were none should exist. Only a decision from this Court will assure uniformity in the application of the approval requirements for settlements or compromises under Rule 9019. The Sixth Circuit decision, here, if permitted to stand, virtually assures future disparity in the application of those compromise standards.

TMT must either be reaffirmed, modified or disavowed. Any such decision must come from this Court. Neither uniformity nor certainty will be achieved if the current Sixth Circuit decision stands as it is.

This Court should grant the writ and reverse the decision of the Sixth Circuit

in this case.

Respectfully submitted

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